CC Docket #96-98

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request by ALTS for Clarification	)	
of the Commission's Rules	)	CCB/CPD 97-30
Regarding Reciprocal Compensation	)	
for Information Service Provider Traffic	)	

REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

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July 10, 1997

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REPLY COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

Time Warner Communications Holdings Inc. ("TWComm") hereby files these reply comments in response to the above-captioned ALTS letter seeking clarification of the status of local calls made to Internet service providers.[1]

I. INTRODUCTION AND SUMMARY

TWComm supports the ALTS Letter. The ILECs have no basis under current law for attempting to avoid paying reciprocal compensation for local calls made to Internet service providers ("ISPs"). There are two existing compensation schemes potentially applicable to this traffic: reciprocal compensation and access charges. If the Commission is going to alter its long-standing treatment of ISPs as outside of the interstate access charge regime, it should do so in a rulemaking proceeding based on an adequate record.[2] The Commission should otherwise

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1 See Letter from Richard J. Metzger, General Counsel, Association for Local Telecommunications Services, to Regina M. Keeney, Chief, Common Carrier Bureau re "Request for Expedited Letter Clarification -- Inclusion of Local Calls to ISPs Within Reciprocal Compensation Agreements, CC No. 96-96" (June 20, 1997) ("ALTS Letter").

2 In fact, this is exactly the subject of an FCC Notice of Inquiry. See Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket

continue to treat ISPs as it has since the beginning of the access charge regime, as end users. Calls to end users in the same exchange are subject to reciprocal compensation.

The ILECs' assertion that calls to ISPs are usually part of an interexchange, interstate communication is both true and irrelevant to the application of reciprocal compensation. But the interstate nature of most Internet traffic does place most (and possibly all) of these calls within the FCC's jurisdiction, notwithstanding the recent Eighth Circuit decision in the Interconnection Order appeal. All that the ILECs have proven is that the FCC retains the jurisdiction to preserve the regulatory regime that has long applied to local calls made to ISPs. Thus, nothing the Eighth Circuit decision changes the fact that this dispute turns on the application of long-standing Commission rules.

II. DISCUSSION

As many of the parties filing comments in this proceeding have pointed out,[3] the FCC has traditionally treated ISPs as "end users" in the interstate access charge regime, and more recently in the universal service rules.[4] Pursuant to this classification, ISPs generally subscribe to local tariffed

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No. 96-263, Notice of Inquiry (released December 24, 1996) ("Internet NOI").

[3] See, e.g., Comments of Teleport at 2-3; Comments of AT&T at 2-3; Comments of ACSI at 4-5; Comments of MCI at 2-4.

[4] See Access Charge Reform, CC Docket No. 96-262, First Report and Order at ¶¶ 344-348 (released May 17, 1997).

business service. Thus, calls that ISPs receive from their subscribers within the same local calling area are treated as local calls for the purposes of the FCC's (and the states') access charge regime.

While the FCC does not seem to have contemplated the exchange of ISP traffic between ILECs and CLECs when it established its reciprocal compensation rules, there are sound reasons for applying those rules in this context.[5] In the Interconnection Order, the Commission established (and the states have followed) a dual scheme for the exchange of traffic under which interexchange traffic would continue to be subject to access charges and local traffic would be subject to reciprocal compensation.[6] These are the only available compensation mechanisms for this traffic.[7] Given the Commission's repeated, and recently reaffirmed, commitment to holding ISPs outside the interstate access charge regime, it would seem completely logical

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5 As ALTS points out in its Letter, however, the Commission seemed to assume in its recent Internet NOI that reciprocal compensation applies to local calls to ISPs. See ALTS Letter at 3 citing Internet NOI. Indeed, as also pointed out by ALTS, several ILECs concede this point in comments submitted in response to the Internet NOI. See ALTS Letter at 3 n.4.

6 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order at ¶ 1034 (1996) ("Interconnection Order").

7 Of course, the adoption of bill and keep for the exchange of local traffic would eliminate this dispute entirely. However, despite CLEC support for bill and keep, most ILECs have successfully opposed it in both regulatory proceedings and interconnection negotiations.

that reciprocal compensation arrangements would apply to local calls to ISPs exchanged between ILECs and CLECs.

Bell Atlantic and NYNEX have tried to argue that calls to ISPs should be exempt from reciprocal compensation because the communications ultimately cross local calling and state boundaries. Although this is of course true in most cases, it is irrelevant (except as explained below) to the proper treatment of this traffic. Connections between an ISP customer and an ISP located in the same calling area have long been treated as local calls despite the fact that the communication may ultimately be interexchange and interstate. Moreover, under the regime established by the FCC in the Interconnection Order, this traffic must be subject to reciprocal compensation since it is not subject to access charges.

Indeed, the predominantly interstate nature of Internet communications has only now become relevant to this proceeding in light of the Eighth Circuit's decision vacating the FCC's rules implementing Section 251(b)(5) (the reciprocal compensation provision).[8] The Eighth Circuit's decision that states have the authority to enforce Section 251(b)(5) was crucially dependent on the assumption that reciprocal compensation would apply only to local telephone service.[9] The implication is that the FCC would

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[8] See Iowa Utils. Bd. v. FCC, 1997 WESTLAW 403401 (8th Cir. 1997).

[9] The Court held that each of the statutory provisions relied on by the FCC for jurisdiction was inadequate because they did not grant the Commission explicit jurisdiction over intrastate traffic. See id. at *4 (holding in general that Section 251 and 252 does not "supply the FCC with the

have the jurisdiction to apply Section 251(b)(5) where communications between end users involved interstate traffic. Such communications fall squarely within the FCC's jurisdiction over interstate communications under Sections 1 and 201 of the Communications Act.[10]

Indeed, the Commission has long held that it has jurisdiction over interstate enhanced or information service traffic. Thus, the Commission stated in the Computer III Remand Proceedings, "we emphasize that the Commission has jurisdiction over interstate enhanced services, and our jurisdiction over interstate communications encompasses communications over physically intrastate facilities used in those communications."[11]

Nor does it make any difference for jurisdictional purposes

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authority to issue regulations governing the pricing of the local intrastate telecommunications services that the incumbent LECs are now legally obligated to provide to their competitors") (emphasis added), id. ("[w]hile subsection 201(b) does grant the FCC jurisdiction over charges regarding communications services, those services are expressly limited to interstate or foreign communications services by subsection 201(a)") (emphasis added), id. at *5 (holding that interconnection services "as well as the rates for the transport and termination of telecommunications traffic qualify as 'charges . . . for or in connection with intrastate communications service'" under Section 2(b) and are thus subject to state jurisdiction) (emphasis added, citation omitted).

10 See 47 U.S.C. §§ 151, 201. Moreover, Congress expressly preserved the Commission's Section 201 jurisdiction under Part II of Title II. Thus, Section 251(i) states that "nothing in this section [251] shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

11 See Computer III Remand Proceedings; Bell Operating Safeguards; and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 174, 181 (1990).

that the communication in question includes a separate state-tariffed service such as the local service to which many ISPs subscribe. In determining whether a communication is intra or interstate, the established rule is that the origination and final termination of the communication must be examined. As the Commission has stated, "jurisdiction over interstate communications does not end at the local switchboard, it continues to the transmission's ultimate destination."[12] As the Commission held with regard to voice mail service,

> This Commission has jurisdiction over, and regulates charges for, the local network when it is used in conjunction with origination and termination of interstate calls. The Commission also has made it clear that it has not ceded jurisdiction over call forwarding when used in interstate communications even if that service is locally tariffed.[13]

Thus, even under the Eighth Circuit's recent decision, the Commission retains jurisdiction over interstate information service traffic. It follows that the Commission may decide how CLECs and ILECs will compensate each other for the exchange of calls to ISPs that are part of interstate communications. But the Commission should exercise this jurisdiction by clarifying that such traffic is subject to the relevant state reciprocal compensation arrangements. Such an approach would be perfectly consistent with the Commission's classification of ISPs as end users for purposes of its access charge regime.

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12 See Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619, 1621 (1992) (citations omitted), aff'd Georgia Pub. Serv. Comm'n v. FCC, 5 F.3d 1499 (11th Cir. 1993).

13 See id.

Moreover, even if the Commission does not exercise its jurisdiction in this manner, it should at least state that it will not do anything to prevent states such as New York from applying reciprocal compensation to this traffic.

III. ARGUMENTS RAISED BY USTA IN OPPOSITION TO THE ALTS REQUEST SHOULD BE REJECTED.

The ILECs, through USTA, agree that this is predominantly interstate traffic,[14] but argue that this fact somehow necessitates an exemption from reciprocal compensation. As explained, even if an interstate service is subject to a state tariff, this fact does not make the communication intrastate. But it does mean that the relevant regulatory regime (prices, terms and conditions) applicable to the individual state-tariffed services continue to apply regardless of whether the state-tariffed service is sometimes part of an interstate communication.

This is exactly the arrangement that has been in place since the Commission decided that it would be inappropriate to apply interstate access charges to ISPs. ISPs have subscribed to local service, which is subject to all of the regulations applicable to that service. That the information service traffic carried over

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[14] USTA seems to assert that all Internet traffic is interstate, which is incorrect. It is possible that all of this traffic must be treated as interstate for jurisdictional purposes, since it may be impossible to distinguish the interstate and intrastate traffic. See Louisianna Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4 (1986). In any case, the arguments in these comments apply to whatever portion of Internet traffic is determined to be actually or functionally interstate.

the local business lines to which the ISPs subscribe is often ultimately interstate and interexchange, does not change this fact. It follows that reciprocal compensation, as one of the regulatory arrangements applicable to local traffic would also apply to calls to ISPs.[15]

To support its position, USTA ultimately falls back on a literal reading of the sections of the Interconnection Order dealing with the application of reciprocal compensation. In particular, USTA relies on the Commission's statement that "reciprocal compensation arrangements should apply only to traffic that originates and terminates within a local area."[16] But, as the Commission made clear in the other sentences in this paragraph which USTA omitted from its citation, this statement was made for the purpose of clarifying that reciprocal compensation arrangements do not apply to conventional toll voice calls.[17] As mentioned, the Commission apparently did not consider the exchange of traffic destined for ISPs when it described the traffic to which reciprocal compensation applies.[18]

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15 In fact, as several commenters point out, it is impermissibly discriminatory for ILECs to apply reciprocal compensation to some local calls and not to others. See Comments of America Online at 11-13.

16 See USTA Comments at 3 citing Interconnection Order at ¶ 1034 (1996).

17 See id. (specifically rejecting Frontier's argument that "section 251(b)(5) entitles an IXC to receive reciprocal compensation from a LEC when a long-distance call is passed from the LEC serving the caller to the IXC").

18 Nor did the Commission apparently account for local calls to leaky PBXs, which have the same characteristics as local calls to ISPs.

But its recent reaffirmation in the Access Charge proceeding of its treatment of ISPs as end users[19] confirms that the Commission would not want to apply access charges to that traffic. The only logical conclusion, therefore, is that reciprocal compensation should apply.

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19 See Access Charge Reform, CC Docket No. 96-262, First Report and Order at ¶¶ 344-348 (released May 17, 1997).

IV. CONCLUSION

The Commission should clarify that local calls to ISPs are subject to reciprocal compensation arrangements established by the states.

Respectfully submitted,

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July 31, 1997

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I, Catherine M. DeAngelis, do hereby certify that on this 31st day of July, 1997, copies of the foregoing "Reply Comments of Time Warner Communications Holdings Inc." were delivered by hand, unless otherwise indicated, to the following parties:

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